Supreme Court, U.S.
FILED

10-342 JUL 6- 2010

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WALTER E. KOZACHUK, M.D.,

Petitioner,

v.

MEDPOINTE HEALTHCARE, INC.
(Doing Business as Wallace Pharmaceuticals, Inc.)

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Walter E. Kozachuk, M.D., pro se
757 Frederick Road
Suite 102
Catonsville, MD 21228
301-807-9346

Petitioner, Pro Se

QUESTION PRESENTED

Should reasonable (or at least *some*) indicia of informed consent, by *voir dire* or otherwise, be a necessary and required element of an oral settlement of a case in open Court, on the record?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defendant-Appellant and Petitioner: Walter E. Kozachuk, M.D.

Plaintiff-Appellee and Respondent: Medpointe Healthcare, Inc., (Doing Business as Wallace Pharmaceuticals, Inc.)

RULE 29.6 DISCLOSURE

This Petition is filed by an individual and not a body corporate; therefore, no Rule 29.6 disclosure is necessary.

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TREATISES:

Dangerous Omissions: A Teaching Hospital's Policy Responsibility to its Patients. Janincemarie K. Vinicky (PhD Dissertation, 1992). (Citing the following authorities):

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The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. Belmont Report: Ethical Principles and Guidelines for the Protection

of Human Subjects of Research. In OPRR Reports, NIH, PHS, HHS, April 18, 1979.

OPINIONS, ORDERS BELOW
Rule 14(i)(i)

Opinions and Orders Below:
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Other Relevant Rulings: Rule 14(i)(ii)
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JURISDICTION

This Court has jurisdiction under 28 U.S.C. §2101(c). The District Court for New Jersey had jurisdiction pursuant to 35 U.S.C. §256 and §1338(a) because the inventorship of United States patents was before the court for determination.

REASONS FOR GRANTING CERTIORARI

The Federal District Court for New Jersey, then the Court of Appeals for the Federal Circuit, upheld an alleged in-court settlement wherein no *voir dire* was conducted on Defendant by the trial court or his attorney. In upholding such a settlement, these courts departed drastically from the accepted and usual course for judicial proceedings so as to call for an exercise of this Court's supervisory power.

Rule 10(a).

STATEMENT OF THE CASE

Original District Court Jurisdiction:

This action is claimed by Respondent to be based on an alleged "correction of inventorship" of three United States patents under 35 U.S.C. § 256 and § 1338(a).

STATEMENT OF FACTS

Defendant retained Attorney Posillico for the purpose of representing him at trial in the above captioned case. On 3-3-07, Attorney Posillico informs the client his opinion of the merits of the case regarding abandonment and inventorship of the patents in suit. His opinion is similar to the defendant's when he states that, "What good is abandonment testimony if there is no testimony as to inventorship? I have to admit that this case seems like it is one that should not go to trial if that is the case. I don't see how our adversary could possibly carry their burden in this case if they have no one to testify about inventorship." The Defendant in this case was well aware that the alleged co-inventor proposed by the Plaintiffs had been found guilty of patent fraud by the Patent Office.

On 5/07, Defendant and Chris Kidd traveled to Philadelphia to meet with Attorney Posillico to discuss defense strategy. At this meeting, Attorney Posillico agreed to defend the case which included discovery, a deposition of the alleged co-inventor Dr. Sofia, and filing a counterclaim.

During the following year, Attorney Posillico failed to communicate with the Dependent and failed to inform him that a trial date had been set by the Court for late May,

2008. Attorney Posillico only contacted the Defendant while he was in Poland several weeks before an alleged trial hearing. Defendant was informed of the date of the alleged hearing not by Attorney Posillico, but by his former counsel John E. Harris, Esq.

At the time of notification of a pre-trial hearing, Attorney Posillico never informed the client that virtually no legal work was performed in this case. Attorney Posillico communicated a proposed settlement that included proposals for generous compensation and royalties. This implied to the Defendant that legal work had actually been performed on behalf of the Defendant.

Attorney Posillico then acutely reverses his opinion and informs the Defendant that he feels the case is lost and threatens to withdraw his representation as a mechanism of forcing Defendant to agree to terms to which he is adamantly opposed. Defendant is aware that any suggestion that the case is weak is absurd since Plaintiff has no co-inventor witness and no credible evidence that any of the patents discovered were written using knowledge obtained during his employment. **[Email dated: Friday, April 25, 2008 8:53 AM].**

Defendant appeared before Judge Bongiovanni [5-14-08] on the advice of Attorney Posillico who advised that a failed pre-trial agreement was required before a trial could go forward. During this procedure, Defendant only met with Judge Bongiovanni once and agreed that he would provide a good faith effort to settle the case. Defendant never had any direct negotiation with Attorney Brown.

Chris Kidd, a Venture Capitalist who attended the meetings and had access to the same information as

Defendant, came to the same conclusion as the Defendant and was also adamant in not settling but taking the case to trial. [email **5-6-08; 8:36 pm**]]

Defendant maintains only that he agreed to negotiate the foreign rights to the patents (these were not in suit) and did not agree to any of the positions of Attorney Brown.

Later in 2007, Defendant wrote Attorney Posillico a "*Forced Pro Se*" letter regarding his lack of representation after obtaining a Pacer Number to determine what legal services were performed. Review of the docket indicates that Attorney Posillico failed in his fiduciary duty to even make a token effort to represent the Defendant.

In this case, a very significant conflict of the loyalty of an attorney to his client occurred and was expressed approximately two weeks prior to trial: the client paid for and demanded a trial while the Attorney dramatically changed course (based on weak and non-credible legal reasoning) in the absence of any changes in the circumstances of the case (other than the Attorney failing to perform his contractual legal defense that he was paid to perform). The Attorney then demanded and attempted to intimidate the Defendant into settling the case without trial.

The Magistrate Judge commenced an all-day settlement pre-trial conference to explore settlement possibilities on May 14, 2008. During this settlement, Defendant was sequestered and never had any direct negotiation with Attorney Brown or the Judge. Defendant received only information that was prudent and useful to his attorney and was reliant on the disinformation of his

Attorney. (An example of being misled is that the oral agreement states that Defendant agrees to give away valuable intellectual property *that was not part of the legal proceedings* while Defendant was informed that this was requested by Plaintiff but denied by Judge Bongiovanni).

When Defendant was informed of the financial settlement proposal ($15,000 per patent) by Plaintiff, he demanded an end to the negotiations but was told that a pre-trial agreement was pre-requisite to going to trial. Such a paltry sum is absurd on its face since the contract under which Defendant was sued states that the minimum he receives is the cost of patent development (assuming the Plaintiff has evidence that the Patents were derived from knowledge during his employment). Review of the oral agreement includes the absurd concession that Defendant give away more intellectual property than was involved under suit; agreeing to extend an expired employment contract; and agreeing that any future intellectual property that Defendant discovers be automatically subject to arbitration by Plaintiff.

Ultimately the Defendant was led into the Courtroom where is claimed to have settled the case pursuant to the following colloquy:

> Mr. Poscillico (Kozachuk's attorney):...There may be certain claims that MedPointe believes are subject to the agreement, and other claims that are not. So the arbitration may be some – some sub portion of the patent application. With that understanding otherwise, I'm in full agreement.
>
> The Court (Medpointe's attorney): Mr. Brown?

Mr. Brown: Yeah. Yeah. We agree that it – you know obviously pending review of it, it could relate to only some of the plans. We agree with that.

The Court: Ok, Dr. Kozachuk, do you agree as well?

Dr. Kozachuk: Yes

The Court: Ok, and I just wanted to specifically note that is the only US Patent that involves Felamate?

Dr. Kozachuk: It is.

App. at 35-a

Defendant was previously assured that any statements made by Plaintiff's Attorney were required to place the position of the Plaintiff on the record in case no resolution was made prior to trial. It is important to note what is not said in this colloquy. Defendant's Attorney never states that "My client agrees to the conditions of the preceding settlement offer". Rather, Defendant's Attorney only agrees that any intellectual property that is not under suit (foreign patents) would be subject to arbitration. That the Defendant agrees to this stipulation is hardly surprising since Defendant previously proposed arbitration of the patents in suit that was rejected by Plaintiff.

NO VOIR DIRE on ANY kind was conducted by anyone at the conclusion of these proceedings. That Defendant's Attorney did not attempt to perform a voir dire is hardly surprising since the Defendant would have realized he had waived his right to a trial. When his

Attorney later attempted to press for Petitioner to execute formal settlement documents (which were drafted without the consent or knowledge of the Defendant), he was astounded to hear that the case had been concluded by the foregoing vague dialogue and adamantly refused to consummate settlement.

When a Motion to Enforce Settlement Agreement was next prosecuted, the conflict of interest and loyalty owed to Defendant by his Attorney was made apparent to the Magistrate Judge (and is therefore of record), who rejected such and ordered Petitioner to settle the case. Petitioner continued to refuse.

ARGUMENT

There should be Reasonable, or at Least *Some* Indicia of Informed Consent, by *Voir Dire* or Otherwise, Required for In-Court, Oral Settlement of Cases on The Record.

THE ETHICS OF INFORMED CONSENT

Appelbaum, Lidz and Meisel, in their book entitled, Informed Consent (1987) describe informed consent: Informed consent refers to the legal rules that prescribe behaviors for professionals in their interactions with clients and provide for penalties under given circumstances, if professionals deviate from those expectations; to an ethical doctrine, rooted in our society's cherished value of autonomy, that insures to clients/patients their right to self-determination when decisions need to be made; and to an interpersonal process whereby professionals interact with clients/patients to select an appropriate course of

action" (Appelbaum, Lidz and Meisel, 3).

Legal cases promulgated in the 1950's and 1960 have provided the precedent for consent and disclosure requirements. The decisions in Natanson v. Kline (1960) and Mitchell v. Robinson (1960) set the tone for future of the course of the legal doctrine of informed consent in the U.S. jurisprudence. Moral agency involves first, a decision as to 'what ought to be done' in a given situation (the deontic judgment) followed by a translation of that action into behavior (McDonald & Victor, 103).

A major concept of the philosophic notion of moral responsibility refers to an agent's trustworthiness and reliability in moral decision-making (Goodpaster and Mathews). They write that, "individuals are responsible if ... they allow appropriate factors to affect their judgment; we refer primarily to person's independent thought processes and decision making, processes that justify an attitude of trust from those who interact with him or her as a responsible individual...Here the focus is on the individual's moral reasoning...and contrast it with such other processes as being financial prudent and attending to legal obligations" (Goodpaster and Mathews, 146, 147).

In the current case, Defendant relied on his agent's dubious trustworthiness and reliability in moral decision making and was therefore unable to make an independent thought process in his decision making. The alleged decision made by the Defendant was made on moral reasoning based on disinformation provided to him thus he was not able to make a financially prudent decision.

Informed consent, at least as it is perceived in the United States, is a process in which communication

between a profession and client occurs that generally results in the client becoming informed about a potential decision recommended by the professional. This process is generally unsupervised and unquestioned, especially if the result is the client's agreement to the case.

The Defendant has noted that his Attorney failed to communicate with him after the initial meeting (a fact corroborated by his partner Chris Kidd). Not only does this violate the ethical process that allows for an individual to make an informed decision, it violates the ethical conduct of an Attorney to his client under New Jersey State Law (RPC 1.4 Communication).

The ethics of informed consent is grounded in several principles governing the rights of clients/patients. The most important principle as articulated in The Belmont Report (1979) and in most textbooks on [medical] ethics written during the past thirty is the principle of respect for persons based primarily on the prima facia right of every individual to self-determination or autonomy.

In the current case, the Defendant was deprived of his right to self-determination and autonomy by deliberate disinformation and deception by his Attorney. This violates the most basic right of the ethics of informed consent.

Beauchamp and Childress, in the Third (3rd) Edition of Principles of Biomedical Ethics, define the notion of informed consent as an autonomous authorization. However, several elements of informed consent must be met for such consent to be considered ethically valid. First, before even considering whether a patient has adequate information to make a voluntary choice, one must assess whether the patient has the competence for choice. *In this*

case we assume that a medical doctor and neuroscientist who has spent a decade involved in neuroscientific patent discovery, the legal process of patent development and venture capital and the process of economics of venture capital has competence to make an informed choice.

Once a determination is made that a patient is competent for choice does not necessarily mean that the patient is free of external coercion or other factors required for valid informed consent, namely the informational elements (1) disclosure of information, (2) understanding of information; and the consent elements, (1) voluntariness and (2) authorization.

For consent to be ethically valid, the professional must have disclosed to the client the information relevant to the decision making regarding the process and procedure in question. Without adequate information, a client's autonomy cannot be respected.

In the current case, it is a matter of record that the Attorney failed to disclose any information to his client (including the date of a scheduled trial several months prior to his initial contact with his client) and also misinformed his client about the nature and facts of the proceedings which thus negate the informational elements of informed consent.

Professionals are, in most cases obligated to disclose "(1) those facts or descriptions that clients or subjects consider material in deciding whether to refuse or consent to the proposed intervention or research, (2) information the professional believes to be material, (3) the professional's recommendation, and (4) the purpose of seeking consent and the nature of consent as an act of

authorization (Beauchamp and Childress, 86-87).

In the current case, it is a matter of record that the Attorney provided facts that were directly opposed to his prior assessment of the case as well s the reality of the legal fasts of the case; credible evidence of what was material to the case; professional recommendations that were valid; and the purpose of seeking the Defendant's consent and authorization. Thus the information provided to the Defendant prior to the pre-trial conference fails on all of the above accounts and prevents the Defendant from consenting to an act of authorization. These violations invalidate the alleged agreement of the client in open court and nullify an alleged act of authorization.

Disclosure should occur in a manner that is readily understandable by the patient/client and should be presented in such a manner as to facilitate the patient's decision making capacity. "In many informed consent cases, the inadequacy of a person's understanding about a single risk or limitation is the reason why the person did not understand what he or she was consenting to. A single missing fact can thus deprive a person of adequate understanding" (Beauchamp and Childress, 100).

In the current case, not only was honest disclosure not provided in an understandable manner but Defendant's attorney indulged in misinformation and deception in order to trick his client into agreeing to an alleged absurd settlement. This impaired the decision making capacity of Defendant. The Defendant was provided with multiple missing facts and deliberate disinformation.

The final elements of consent from an ethical standpoint are the consent elements of voluntariness and

authorization. Simply defined, voluntariness means that a person is acting or deciding in the presence of adequate knowledge, in the absence of psychological compulsion, and in the absence of external constraints (Beauchamp and Childress, 106).

In the current case, the record is clear that voluntariness was denied the Defendant by his Attorney by inadequate knowledge while the absence of psychological compulsion and absence of external constraints was also denied by the threats and pressure of his Attorney who threatened withdrawal from the case if the Defendant did not agree to terms he felt were despicable. In addition, rather than informing the Defendant that he breached his duty and had a legal right to replacement counsel, this Attorney continued to enforce an agreement by violating the principle of confidentiality of privileged communication between attorney and client. A recent example is that Plaintiff's counsel accuses Defendant of using "shadow counsel" and names attorney James Crawford Sr. after Attorney Posillico struck his appearance. This accusation fails since James Crawford Sr. deceased on 12-2-08 [prior to Attorney Posillico striking his appearance]. However, since Attorney Crawford did speak to Attorney Posillico prior to his death, this information could only have been provided by former counsel Joe Posillico. This is a violation of professional ethics and attorney-client privilege.

Beauchamp and Childress further state that "a person acts voluntarily to the degree he or she wills the action without being under the control of another agent's influence" (Beauchamp and Childress, 106-107).

In the current case, this is the most egregious act of former Attorney Posillico since any dubious alleged

agreement in open court was a direct result of the Defendant being under the control of another's agent's influence both against his will and better judgment. This devious manipulation prevented the Defendant form acting voluntarily and thus negates any rationale informed consent that the prior Court rulings allege.

Authorization is often the conclusion of a lengthy process of dialogue between the professional and the client. Authorization is not merely the patient's signature on a consent document, but the conclusion of a process of assessing the patient's competence for choice, disclosing adequate and appropriate information to such clients/patients, receiving feedback from the client/patient, an assessment of the patient's understanding of the meaning of an authorization if one is to be given, an assessment of the freedom of the patient to choose, and the culmination of a process of shared decision making resulting in the patient's acceptance or rejection of the professional's recommendation.

In the current case, Authorization of the alleged agreement in open court can only be deemed null and void since there is insufficient information for competent choice; adequate and appropriate information was not disclosed; and an assessment of the Defendant's understanding and freedom to choose was denied by the lack of voir dire; and thus the culmination of the process was inadequate to make an informed decision to accept or reject the alleged agreement in open court.

In the conclusion of The President's Commission Report: Making Health Care Decisions, it states: "Current requirements for informed consent owe much to the legal system, but the values underlying these requirements are

not merely legal artifacts. Rather, they are deeply embedded in American culture and the American character; they transcend partisan ideologies and the politics of the moment. Fundamentally, informed consent is based on respect for the individual, and, in particular, for each individual's capacity and right both to define his or her own goals and to make choices designed to achieve these goals" (Making Health Care Decisions, Vol. 1, 17).

In the current case, the Defendant was denied the right to make an informed decision regarding consent based on the lack of respect as individual and thus his capacity and right to define his own goals and choices were denied

In summary, the requirements for valid informed consent included an assessment of the competence of the patient for choice (the threshold element), disclosure by the professional of the essential elements of informed consent (nature of the problem, options, risks, benefits, alternatives to the recommended solutions if they exist, as well as risks and benefits of alternatives). Valid informed consent also requires that the patient comprehend the proposed solution and the person be as free from coercive elements as possible; that is, that the patient who is self-determining has the primary right to decide to accept or refuse the therapy/research. And finally valid informed consent requires the authorization of the subject.

In the current case, the actions of Attorney Posillico violated and failed to satisfy all of the elements of proper informed consent. The Defendant has provided ample evidence that his right to make an informed was denied all of the principles of informed consent.

CONCLUSION

For the foregoing reasons and lack of informed consent, the alleged "settlement agreement" in this case should be rejected and the case remanded to trial.

Respectfully submitted,

Walter E. Kozachuk, MD

Walter E. Kozachuk, MD
757 Frederick Road; #102
Catonsville, MD 21228
[301] 807-9346

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SUPPLEMENTAL APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

Walter E. Kozachuk, M.D., pro se
757 Frederick Road
Suite 102
Catonsville, MD 21228
301-807-9346

Petitioner, Pro Se

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Appendix A

United States Court of Appeals for the Federal Circuit

2009-1500

MEDPOINTE HEALTHCARE INC.,
(doing business as Wallace Pharmaceuticals),

Plaintiff-Appellee,

v.

WALTER E. KOZACHUK,

Defendant-Appellant.

Richard H. Brown, III, Day Pitney LLP, of Morristown, New Jersey, for plaintiff-appellee. With him on the brief was Anthony J. Marchetta.

Walter E. Kozachuk, of Catonsville, Maryland, pro se.

Appealed from: United States District Court for the District of New Jersey Judge Mary L. Cooper

United States Court of Appeals for the Federal Circuit

2009-1500

MEDPOINTE HEALTHCARE INC., (doing business as Wallace Pharmaceuticals),

Plaintiff-Appellee,

v.

WALTER E. KOZACHUK,

Defendant-Appellant.

Appeal from the United States District Court for the District of new Jersey in Case No. 3:04-CV-02019, Judge Mary L. Cooper.

DECIDED: April 6, 2010

Before LOURIE, GAJARSA, and MOORE, Circuit Judges.

PER CURIAM.

Walter E. Kozachuk appeals from an order of the United States District Court for the District of New Jersey enforcing a settlement agreement in which Dr. Kozachuk agreed to transfer ownership of U.S. Patents 5,728,728 ("the '728 patent"); 5,942,540 ("the '540 patent"); and 6,515,019 ("the '019 patent") to MedPointe Healthcare, Inc. ("MedPointe"). We affirm.

BACKGROUND

Between February 1, 1993, and October 4, 1994, Kozachuk worked for MedPointe's predecessor, Carter-Wallace, Inc., supervising clinical studies of the drug Felbamate. Under the terms of his employment agreement, Kozachuk agreed to assign to Carter-Wallace and its successors any and all inventions, discoveries, or improvements made, discovered, or conceived by him during his employment. Eighteen months after leaving Carter-Wallace, on April 10, 1996, Kozachuk filed the first in a series of patent applications, which issued as the '728, '540, and '019 patents, all of which claim clinical uses of Felbamate to treat neurological indications. On April 28, 2004, MedPointe brought suit against Kozachuk claiming ownership of the '728, '540, and '019 patents based on Kozachuk's breach of his employment agreement and duty of loyalty and seeking to correct the patents' inventorship under 35 U.S.C. § 256.

After years of litigation and with trial set for May 19, 2008, the parties participated in a settlement conference before Magistrate Judge Bongiovanni, on May 14, 2008. The parties negotiated for over four hours, after which the court placed the material terms of a settlement agreement on the record. The terms included: (1) a $60,000 payment by MedPointe to Kozachuk; (2) a transfer of all right, title, and interest in Kozachuk's patents to MedPointe; (3) an agreement to arbitrate any disputes over Kozachuk's ownership of a pending U.S. patent application related to Felbamate; and (4) a reservation of rights by MedPointe with respect to any foreign patents or patent applications. Both MedPointe's representative and Kozachuk assented to those terms on the record, and the parties agreed that MedPointe's counsel would incorporate them, along with

other ancillary terms, into a written settlement agreement.

On June 16, 2008, MedPointe's counsel provided Kozachuk with a draft Settlement Agreement and Release and a draft Assignment ("the Settlement Documents"). Kozachuk, however, refused to sign the Settlement Documents, accusing his counsel, Joseph Posillico, of inadequate representation and misleading him into a settlement. On October 29, 2008, having still not received executed Settlement Documents from Kozachuk, MedPointe filed a motion to enforce the settlement agreement and for sanctions against Kozachuk.

On March 4, 2009, Magistrate Judge Bongiovanni issued an order recommending that the district court grant MedPointe's motion to enforce the settlement, concluding that an enforceable settlement had been reached on May 14, 2008, despite the lack of a written document. MedPointe Healthcare, Inc. v. Kozachuk, No. 04-2019, 2009 WL 540680, at *4-*5 (D.N.J. Mar. 4, 2009) ("Report and Recommendation"). Judge Bongiovanni found that Kozachuk's claims that he did not understand the proceedings and did not intend to settle "lack credibility", as he is a well-educated and sophisticated individual who is familiar with the litigation process and the court had made clear the proceedings' purpose before putting the settlement terms on the record. Id. At *4. The judge also rejected Kozachuk's claim that a voir dire was necessary. Id. At *5. Kozachuk filed an objection to the Report and Recommendation pro se.

On June 15, 2009, the district court, after a de novo review of the record, adopted the findings and conclusions of the Report and Recommendation. MedPointe Healthcare, Inc. v. Kozachuk, No. 04-2019, 2009 WL 1662226 (D.N.J.

June 15, 2009). And on June 30, 2009, the court ordered Kozachuk to execute the Settlement Documents and imposed sanctions on Kozachuk of $32,555.13, representing MedPointe's reasonable attorney's fees and costs incurred enforcing the settlement. MedPointe Healthcare, Inc. v. Kozachuk, No. 04-2019, slip op. at 1-2 (D.N.J. June 30, 2009). Kozachuk appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

DISCUSSION

The court reviews a decision to enforce a settlement agreement, an issue not unique to patent law, under the law of the appropriate regional circuit. See Schaefer Fan Co. v. J. & D Mfg., 265 F.3d 1282, 1288 (Fed. Cir. 2001). Under Third Circuit law, we review the district court's factual findings regarding the existence of an enforceable settlement agreement for clear error. See Tierman v. Devoe, 923 F.2d 1024, 1031 n.5 (3d Cir. 1991). *A factual finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.* Brisbin v. Superior Valve Co. 398 F.3d 279, 285 (3d cir. 2005) (Internal citations omitted).

Kozachuk makes three arguments on appeal. First, he argues that because he did not understand the proceedings on May 14, 2008, and had no intention of settling, there was no "meeting of the minds" necessary to effectuate a settlement agreement. Kozachuk contends that the transcript of the proceedings does not clearly reflect his agreement to the settlement terms, faults the court for failing to engage him in a comprehensive voir dire, and claims that his actions demonstrate that he did not believe he had settled. Alternatively, Kozachuk next

argues that the settlement terms are unconscionable, requiring him to transfer patents assertedly worth millions of dollars to MedPointe for a paltry $60,000 simply because MedPointe's predecessor briefly employed him over a decade ago. Finally, Kozachuk alleges that the settlement is unenforceable because of unseemly conduct by his attorney, and specifically because after inadequately preparing the case for trial, Posillico coerced him into settling by adopting an overwhelmingly assessment of the case and threatening to withdraw as counsel.

MedPointe responds that the direct court did not clearly err in finding that Kozachuk entered into an enforceable settlement agreement at the conference on May 14, 2008. Specifically, MedPointe contends that the transcript of the conference, in addition to Kozachuk's e-mails and sworn statements, demonstrate that the parties agreed to the essential terms of the settlement on May 14, 2008. Further, according to MedPointe, a voir dire was unnecessary given the Magistrate Judge's active participation in the negotiations and Kozachuk's sophistication and familiarity with the litigation process. With regard to the enforceability of the settlement terms, MedPointe argues that Kozachuk did not make the argument below, but regardless, the argument lacks merit as there is no evidence that $60,000 in exchange for the transfer of Kozachuk's three patents is in any way disproportionate, let alone unconscionable. Finally, MedPointe argues that there is no evidence that Kozachuk's counsel intended to or did in fact pressure Kozachuk into settling by threatening to withdraw.

We agree with MedPointe and reject all three of Kozachuk's arguments. Under New Jersey law, which governs a settlement agreement made in New Jersey, a

settlement agreement is a binding contract that is enforceable regardless whether it has been reduced to writing. United States v. Lightman, 988 F. Supp. 448, 459 (D.N.J. 1997). "Where the parties agree upon the essential terms of a settlement, so that the mechanics can be 'fleshed out' in a writing to be thereafter executed, the settlement will be enforced notwithstanding the fact the writing does not materialize because a party later reneges". Lahue v. Pio Costa, 623 A.2d 775, 788 (N.J. Super, App. Div. 1993). In this case, the district court did not clearly err in finding that the transcript of the May 14, 2008, settlement conference established that Kozachuk had entered into an enforceable settlement agreement with MedPointe. Report and Recommendation at *4.

The transcript of the proceedings clearly evinces both parties' intent to settle the suit brought by MedPointe on specific terms. At the conclusion of the May 14, 2008, conference, the Magistrate Judge summarized the purpose of the day's proceedings, concluding that "it appears that we have terms that we'd like to place on the record." J.A. 75. Judge Bongiovanni then went on to describe the process, explaining how MedPointe's counsel would state the terms of the settlement for the record and that the court would then ask each party for its agreement. Specifically, the court stated:

> So, Mr. Brown [MedPointe's counsel], as plaintiff, I would ask you [to place the terms on the record]. And then, Ms. French [MedPointe's representative] I would ask you if you concur in the terms. And then I would turn to you, Mr. Posillico, likewise ask you if – make sure we have all of our basis covered

> and then ask Dr. Kozachuk if he agrees as well.

Id. After assent by MedPointe's counsel, MedPointe's representative, and Kozachuk's counsel, the court asked Kozachuk, "Do you agree as well?" Id. at 75-78. And Kozachuk replied, "Yes." Id. at 78. At no time did Kozachuk ask for clarification or in any way indicate that he did not understand that he was agreeing to a settlement on the terms stated by MedPointe's counsel. In light of Kozachuk's high level of education, his obvious familiarity with the litigation process, and his failure to express any lack of understanding except after the fact, the court did not clearly err in finding that a binding settlement agreement had been formed.

Moreover, Kozachuk's assertions that he never intended to settle and did not realize that he had settled are directly contradicted by evidence of record. For example, in a sworn declaration, Kozachuk recalls a conversation between Judge Bongiovanni and his counsel on the day of the conference and states, "I was prepared to negotiate a settlement, if possible." Id. at 274. And, after receiving a bill from his counsel, Kozachuk replies that, "We settled this case for $60K." Id. at 182. Thus, both before and after the settlement conference, Kozachuk clearly understood the purpose and consequences of the proceedings.

We also reject Kozachuk's claim that the settlement terms are unconscionable. Although Kozachuk raised the issue for the first time on appeal, and thus it is not properly before us, Sage Prods., Inc. v. Devon Indus., Inc., 126 F.3d 1420, 1426 (Fed. Cir. 1997), we note that the argument is wholly without merit. Courts ordinarily do not set aside a

settlement for inadequate consideration unless "the inadequacy of consideration is grossly shocking to the conscience of the court". Pascarella v. Bruck, 462 A.2d 186, 190 (N.J. Super. App. Div. 1983). Kozachuk asserts that the '728, '540, and '019 patents are worth millions of dollars, but he presents no evidence to establish their worth. Simply nothing in the record evinces an inadequacy of consideration, let alone an inadequacy that shocks the conscience.

Finally, we reject Kozachuk's claim that his attorney's behavior coerced him into accepting the settlement. The transcript of the May 14, 2008, conference lacks any indication that Kozachuk and his counsel differed over the settlement or its terms. Furthermore, it strains credibility to think that Kozachuk, who had already retained new counsel once during the litigation and who worked with sophisticated business advisors, felt that he had no choice but to settle because its counsel indicated a desire to withdraw in light of their disagreements over the merits of the case. Moreover, to the extent that Kozachuk claims inadequate representation by his chosen counsel, it is well-established that a party is bound by the actions of his counsel and may not after the fact disavow counsel's actions on his behalf. Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962).

Accordingly, we affirm.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MEDPOINTE HEALTHCARE, INC.	:	CIVIL ACTION NO. 04-2019 (MLC)
Plaintiff,	:	**O R D E R**
v.	:	
WALTER E. KOZACHUK	:	
Defendant.	:	

For the reasons stated in the Court's Memorandum Opinion, dated June 10, 2009, **IT IS** on this 29th day of June, 2009, **ORDERED** that the Report and Recommendation of the Magistrate Judge, filed on March 4, 2009, recommending that the Court grant plaintiff's motion to enforce settlement (dkt. entry no. 116), is hereby **ADOPTED** as the findings of fact and conclusions of law of this Court; and

IT IS FURTHER ORDERED that defendant's objection to the Report and Recommendation (dkt. entry no 118) is **DENIED**; and

IT IS FURTHER ORDERED that plaintiff's motion to enforce settlement (dkt. entry no 103) is **GRANTED**; and

IT IS FURTHER ORDERED that defendant is **DIRECTED** to execute the Settlement Agreement and Release and the Assignment prepared by counsel for both parties and submit those executed documents to plaintiff no later than **July 20, 2009**; and

IT IS FURTHER ORDERED that sanctions are awarded in favor of plaintiff and against defendant in the amount of $9,842.78, representing plaintiff's reasonable attorneys fees and costs incurred in attempting to execute settlement through the time of drafting and filing the motion to enforce settlement; and

IT IS FURTHER ORDERED that additional sanctions are awarded in favor of plaintiff and against defendant in the amount of $22,712.35, representing the amount of plaintiff's reasonable attorneys fees and costs incurred from November 1, 2008 to date, including for preparing for and attending the January 29, 2009 hearing (see dkt. entry no. 124); and

IT IS FURTHER ORDERED that Plaintiff may deduct the amount of the above-referenced sanctions from the settlement payment due to the defendant pursuant to the Settlement Agreement and Release; and

IT IS FURTHER ORDERED that the Clerk of the Court designate the motion to enforce settlement (dkt. entry no. 103) and the Report and Recommendation (dkt. entry no. 116) as **DECIDED AND TERMINATED.**

s/ Mary L. Cooper

Mary L. Cooper
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MEDPOINTE HEALTHCARE, INC.	:	CIVIL ACTION NO. 04-2019 (MLC)
Plaintiff,	:	
	:	**MEMORANDUM**
v.	:	**OPINION**
	:	
WALTER E. KOZACHUK	:	
	:	
Defendant.	:	

THE PLAINTIFF, Meda Pharmaceuticals Inc., as successor-in-interest to MedPointe Healthcare, Inc., having moved for an order enforcing the settlement reached and placed on the record during the May 14, 2008 settlement conference, against defendant, Walter E. Kozachuk (dkt. entry no. 103; see dkt. entry no. 101); and the Magistrate Judge having (1) held a hearing on the motion on January 29, 2009, and (2) issued a Report and Recommendation ("R&R") on March 4, 2009, recommending that (a) the motion be granted, and (b) "sanctions be imposed against [defendant] for the amount of [plaintiff's] reasonable attorneys fees and costs" (dkt. entry no. 108, R&R at 11); and defendant having filed a timely objection to the Magistrate Judge's R&R pursuant to Federal Rule of Civil Procedure 72(b) (2) and Local Civil Rule 72.1(c) (2) (dkt. entry no. 118); and plaintiff opposing the objection (dkt. entry no. 119); and

IT APPEARING that pursuant to Federal Rule of Civil Procedure 72(b) (3) and Local Civil Rule 72.1(c) (2), because an order enforcing a settlement is dispositive, the Court must make a de novo determination of those portions to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge; but the Court noting it need not conduct a new hearing or take new evidence in making this de novo review, and it may consider the record developed before the Magistrate Judge and make a determination on the basis of that record, Fed. R. Civ. P. 72(b) (3); L. Civ. R. 72.1; and

DEFENDANT appearing to object to the Magistrate Judge's finding that "[w]hile the Court did not engage in an extensive voir dire of [defendant], such a voir dire is not necessary" (dkt. entry no. 188, Pl. Obj. at 8; see R&R at 9); and defendant supporting his objection by arguing, inter alia, that (1) due to the "dramatically differing goals" of defendant and his attorney at the time of the settlement conference, a thorough voir dire of defendant should have been conducted "to ensure, so as to preclude any later question, that [defendant and his attorney] had come to agree to settle, that [defendant] understood precisely the issues and their import, and that the settlement was the free and voluntary act of [defendant]," and (2) "a proper voir dire would have removed all questions regarding whether there was a settlement, and if so, what the terms of it were" (id. at 8-9); and

THE COURT noting the strong public policy in New Jersey favoring settlement agreements, Brundage v. Estate of Carambio, 951 A.2d 947, 961-62 (N.J. 2008); and the Court further noting that, absent compelling

circumstances, courts should "strain" to uphold settlements, see, Zuccarelli v. State, 741 A.2d 599, 604 (N.J. App. Div. 1999); Bistricer v. Bistricer, 555 A.2d 45, 49 (N.J. Super. 1987); see also Borough of Haledon v. Borough of N. Haledon, 817 A.2d 965, 975 (N.J. App. Div. 2003) (finding an agreement to settle is a contract, which a court, absent a demonstration of fraud or other compelling circumstances, should honor and enforce); Pascarella v. Bruck, 462 A.2d 186, 191 (N.J. App. Div. 1983) (finding an oral agreement as to the essential terms of the agreement is valid even if the parties intend to later execute the formal written document); and

THE COURT finding, in accordance with the Magistrate Judge's R&R and New Jersey law, that on May 14, 2008, a binding settlement was formed between the parties (see R&R at 5-6); and the Court further finding that the record reveals that defendant, a well-educated and sophisticated doctor, (1) understood he was participating in a settlement proceedings, (2) was apprised of the terms of the settlement, and (3) agreed, without objecting during the four hour settlement conference, to settle the matter for the terms stated on the record (see dkt. entry no. 101, Tr. At 3-6); and the Court finding, even if defendant and his attorney had "dramatically differing goals," no evidence has been presented that defendant was pressured or misled in to agreeing to settle, see Jennings v. Reed, 885 A.2d 482, 488-89 (N.J. App. Div. 2005); see also Newell v. Hudson, 868 A.2d 1149, 1161 (N.J. App. Div. 2005); and the Court noting that defendant fails to cite any authority supporting his position that extensive voir dire in this case was necessary; and

THE COURT having thoroughly reviewed the R&R, defendant's objection to the R&R (dkt. entry no. 118), plaintiff's response to the objection (dkt. entry no. 119), and the record before the Magistrate Judge; and the Court finding that defendant's objection is without merit; and

THE COURT thus intending to (1) adopt the Magistrate Judge's R&R (dkt. entry no. 116) as the findings of fact and conclusions of law of this Court, (2) deny defendant's objection to the R&R (dkt. entry no. 118), (3) grant plaintiff's motion to enforce settlement (dkt. entry no. 103), (4) direct defendant to execute the Settlement Agreement and Release and the Assignment prepared by counsel for both parties and submit those executed documents to plaintiff no later than July 20, 2009, (5) impose sanctions against defendant for the amount of $9,842.78, representing plaintiff's reasonable attorneys fees and costs incurred in attempting to execute settlement through the time of drafting and filing the motion (see dkt. entry no. 103, Brown Aff. At 6-7), (6) impose sanctions against defendant for the amount of plaintiff's reasonable attorneys fees and costs incurred in preparing for and attending the January 29, 2009 hearing, and (7) allow plaintiff to deduct the amount of the above-referenced sanctions from the Settlement Agreement and Release; and the Court allowing plaintiff until **June 18, 2009** to submit a supplemental affidavit regarding the amount of plaintiff's reasonable attorneys fees and costs incurred from November 1, 2008 to date, including for preparing for and attending the January 29, 2009 hearing; and the Court allowing defendant until **June 25, 2009** to respond to

plaintiff's submission; and the Court intending to issue an appropriate Order after the time for supplemental submissions by the parties has expired.

s/ Mary L. Cooper

Mary L. Cooper
United States District Judge

Dated: June 10, 2009

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MEDPOINTE HEALTHCARE, INC.	:	CIVIL ACTION NO. 04-2019 (MLC)
Plaintiff,	:	
	:	**REPORT AND**
v.	:	**RECOMMENDATION**
	:	
WALTER E. KOZACHUK	:	
	:	
Defendant.	:	

BONGIOVANNI, Magistrate Judge

This matter comes before the Court upon the Motion of Plaintiff MedPointe Healthcare, Inc. ("MedPointe") for an Order enforcing settlement against Defendant Dr. Walter E. Kozachuk ("Dr. Kozachuk"). The Court held a hearing on this Motion on January 29, 2009 and has fully considered the parties' arguments as set forth at that hearing and in their papers. For the reasons set forth below, the Court recommends that MedPointe's Motion be granted.

I. Background

Dr. Kozachuk is the record owner of all rights, title and interest in the following three patents, all of which

relate to the medical use of felbamate: U.S. Patent No. 5,728,728 (the " '728 patent"), U.S. Patent No. 5,942,540 (the " '540 patent") and U.S. Patent No. 6,515,019 (the " '019 patent"). On April 28, 2004, MedPointe initiated this case against Dr. Kozachuk claiming that Dr. Kozachuk is not the true inventor or at least not the sole inventor of the '728, '540 and '019 patents. (*See generally,* Pl. Compl. and Amended Compl.) Dr. Kozachuk denied MedPointe's allegations and this litigation proceeded. (*See generally* Def. Answer). A trial date was set in this matter for May 19, 2008.

Prior to the start of trial, on May 14, 2008, the undersigned conducted a settlement conference with counsel and both parties in this matter. The settlement conference lasted approximately four hours. At the end of the conference, the parties had agreed to settle the matter. In order to memorialize the settlement reached by MedPointe and Dr. Kozachuk, the Court had counsel and the parties place the terms of their settlement on the record. (*See generally*, May 14, 2008 Settlement Tr.). Given the settlement reached in this matter, on May 15, 2008, the Court dismissed MedPointe's Complaint and gave the parties sixty days to reduce their settlement agreement to writing, and, if desired, to file an additional stipulation of dismissal with the Court. (*See* Hon. Mary L. Cooper's 5/15/08 Order).

On June 16, 2008, counsel for MedPointe provided counsel for Dr. Kozachuk with a draft Settlement Agreement and Release and a draft Assignment (collectively, the "Settlement Documents"). (*See* October 29, 2008 Brown Aff. at ¶8). Because the Settlement Documents were not executed by July 14, 2008, the Court extended the previously entered 60-day Order until August

13, 2008. (Hon. Mary L. Cooper's 7/14/08 Order). The Court subsequently extended the parties' deadline for reducing their agreement to writing a second time on August 13, 2008, giving them until August 28, 2008 to consummate the written agreement. (Hon. Tonianne J. Bongiovanni's 8/13/08 Order).

Between August 7, 2008 and August 27, 2008 counsel for both parties' communicated in an effort to finalize the written settlement agreement and MedPointe sent revised Settlement Documents to Dr. Kozachuk's counsel. *(See* October 29, 2008 Brown Aff. at ¶¶10-13). However, on August 27, 2008, counsel for Dr. Kozachuk informed counsel for MedPointe that he was unable to obtain his client's signature on the revised Settlement Documents. (*Id.* at ¶13). Counsel for Dr. Kozachuk also indicated that he would be filing a motion to withdraw as counsel, which he did later that day. On September 3, 2008, the Court conducted a telephone conference regarding the status of the settlement of this matter. During the telephone conference, the Court extended the 60-day Order a third time until November 1, 2008 and instructed counsel for Dr. Kozachuk to inform Dr. Kozachuk that if he fails to execute the Settlement Documents and if the Court finds that in light of the settlement reached on May 14, 2008 his failure to do so is unwarranted, sanctions may be imposed against him. (Hon. Tonianne J. Bongiovanni's 9/4/08 Order). The Court also required Dr. Kozachuk to obtain a copy of the transcript of the May 14, 2008 settlement proceedings and to furnish a copy of that transcript to MedPointe. (*Id.*)

On October 29, 2008, having not received executed Settlement Documents from Dr. Kozachuk, MedPointe filed the instant Motion seeking to enforce settlement and for sanctions. Dr. Kozachuk opposes MedPointe's Motion. The

parties' arguments are set forth in detail in their papers and were heard by this Court during the January 29, 2009 hearing. As a result, the Court shall not restate them at length herein.

To summarize, MedPointe seeks to enforce the settlement reached and placed on the record during the May 14, 2008 settlement conference. MedPointe argues that an enforceable agreement was reached on May 14, 2008 and the fact that the agreement was never reduced to writing is irrelevant. Specifically, MedPointe argues that the essential terms of the settlement, which follow, were agreed upon by the parties at the May 14, 2008 conference: (1) MedPointe will pay $60,000 to Dr. Kozachuk; (2) Dr. Kozachuk will transfer all right, title and interest in the three United States patents in suit, namely the '728, '540 and '019 patents, to MedPointe or its successor; (3) MedPointe will review Dr. Kozachuk's pending United States patent application regarding felamate to determine whether in MedPointe's view all or part of the application triggers Dr. Kozachuk's obligations under his agreement with Carter Wallace. If MedPointe thinks that all or part of it does, counsel for MedPointe and Dr. Kozachuk will confer in an effort to reach an agreement on a proper course of action and if an agreement cannot be reached the parties will arbitrate the dispute to determine whether Dr. Kozachuk's patent application or patent, if issued, needs to be transferred to MedPointe's successor, understanding that the arbitration may only bear on part of Dr. Kozachuk's application; and (4) the settlement is without prejudice to MedPointe or its successor's rights with respect to any foreign patents or patent applications for foreign patents obtained by Dr. Kozachuk that relate to felamate. MedPointe also argues that because Dr. Kozachuk has no basis for failing to sign the Settlement Documents as

revised on August 12, 2008, Dr. Kozachuk should be sanctioned and MedPointe awarded the fees and costs it has occurred since August 12, 2008. In this regard, MedPointe suggests that the Court set off $9,842.78 from the $60,000 due to Dr. Kozachuk according to the settlement.

As previously stated, Dr. Kozachuk opposes MedPointe's Motion to enforce settlement. Dr. Kozachuk argues that he did not understand the May 14, 2008 proceedings and that he "had no conception that the 'offer' being discussed was accepted by him[.]" (Dr. Kozachuk's Br. at 1). Dr. Kozachuk claims that he had no idea that he was foregoing his right to try this matter. Dr. Kozachuk alleges that on May 3, 2008 he told his counsel to not even respond to an offer that was nearly identical to that put forward at the May 18, 2008 hearing (it called for a payment of $40,000 instead of $60,000). Dr. Kozachuk further argues that also relevant is the fact that after he informed his counsel not to counter MedPointe's settlement offer and to prepare to go to trial, on May 5, 2008, only nine days prior to the Court's settlement conference and fourteen days before the trial of this patent litigation was slated to begin, his attorney attempted to coerce him into settling this matter by threatening to withdraw as counsel.

In addition, Dr. Kozachuk claims that it is clear that he did not intend to settle this matter because a number of triable issues remained in the case. Further, he argues that his lack of intent to settle is evident by the fact that MedPointe's offer "constituted an unfathomable capitulation" given the fact that Dr. Kozachuk believed and continues to believe that he has "an excellent chance to prevail at trial". (*Id.* at 4-5). Dr. Kozachuk argues that it is "unthinkable that he understood that he was turning over

his three patents to an employer of a decade ago for $60,000: no license, no royalty, indeed no compromise at all." (*Id.* at 27). Indeed, he states that it is plain that he did not understand the settlement or intend to settle because the alleged settlement would mean he had agreed "to walk away from his three multi-million-dollar patents for a mere $60,000.00 (far less than even the cost of obtaining the patents)." (*Id.* at 6). Moreover, the alleged settlement would mean he had agreed "to turn over *four*" patents when he had only been sued on three. (*Id.* at 27) (Emphasis in original). Dr. Kozachuk also argues that his actions following the purported settlement show that he never intended to settle this matter. Further, Dr. Kozachuk claims that the May 14, 2008 proceedings lacked any *voir dire* by the Court or his counsel to ensure that he understood the settlement to which he purportedly agreed.

II. DISCUSSION

A settlement agreement is a type of contract. *See Mortellite v. Novartis Crop Prot. Inc.*, 460 F.3d 483, 492 (3d Cir. 2006) (citing *Borough of Haledon v. Borough of N. Haledon,* 358 N.J. Super. 289, 305 (App. Div. 2003)). Consequently, courts look to state contract law when determining whether an enforceable settlement agreement has been reached. *See Id.*

In New Jersey, there is a strong policy favoring settlements. *Nolan v. Lee Ho.,* 120 N.J. 465, 472 (1990). Consequently, courts "strain to give effect to the terms of a settlement whatever possible." *Dep't of Pub. Advocate v. N.J. Bd. Of Pub. Util.,* 206 N.J. Super.523, 528 (App. Div. 1985). Nevertheless, courts will note enforce "[a] settlement... 'where there appears to have been an absence of mutuality of accord between the parties or their

attorneys in some substantial particulars, or the stipulated agreement is incomplete in some of its material and essential terms.'" *Bistricer,* 231 N.J. Super 143, 147 (Ch. Div. 1987) (quoting *Kupper v. Barger,* 33 N.J. Super. 491, 494 (App. Div. 1955)). However, "a contract is no less a contract because some preferable clauses may be omitted either deliberately or by neglect. So long as the basic essentials are sufficiently definite, any gaps left by the parties should not frustrate their intention to be bound." *Id.* (internal quotation marks and citation omitted).

Moreover, under New Jersey law, as long as "the parties orally agree on the essential terms," a contract is formed. *McDonnell v. Engine Distributors,* Civil Action No. 03-1999, 2007 WL 2814628, *3 (D.N.J. Sept. 24, 2007). This is true "'even though [the parties] contemplate the later execution of a formal document to memorialize their undertaking.'" *Id.* (quoting *United States v. Lightman,* 988 F. Supp. 448, 459 (D.N.J. 1997). As a result, "as long as those essential terms are agreed to, 'the settlement will be enforced notwithstanding the fact that a writing does not materialize because a party later reneges.'" *Id.* (quoting *Lahue v. Pio Costa,* 263 N.J. Super. 575, 596 (App. Div. 1993).

Under these principles, the Court finds that an enforceable settlement was reached on May 14, 2008. While Dr. Kozachuk argues that he did not understand the May 14, 2008 proceeding and did not intend to settle this matter, the Court finds Dr. Kozachuk's arguments in this regard to lack creditability. While not an attorney, Dr. Kozachuk is a well educated and sophisticated individual who is not entirely unfamiliar with the litigation process. Dr. Kozachuk was in Court for approximately four hours on May 14, 2008, while the undersigned worked with counsel

and the parties in an effort to settle this matter. At the end of four hours, counsel reported that the parties had agreed to settle the matter. The Court then placed the parties' settlement on the Record. In so doing, the Court made clear the purpose of the day's proceedings:

> THE COURT: Okay. I understand we've been participating in settlement discussions. It's nearly seven o'clock. You gentlemen and ladies have been here since 2:30 and its appears that we have terms we'd like to place on the record.

(May 14, 2008 Settlement Tr. At 3:10-14). The Court then set forth how the terms of the parties' settlement would be placed on the Record:

> THE COURT: So, Mr. Brown, as plaintiff, I would ask you to do that [place the terms of the settlement on the Record]. And then, Ms. French, I would ask you if you concur in the terms. And then I would turn to you, Mr. Posillico, likewise ask you if – make sure we have all our bases covered and then ask Dr. Kozachuk if the agrees as well.

(*Id.* at 3:15-20). As the Record indicates, counsel and the parties then placed the terms of the settlement on the record in accordance with the procedure outlined above.

> MR. BROWN: All right. Your Honor, we've – we've agreed to the – the

settlement and principle on the following terms: MedPointe will pay to Dr. Kozachuk $60,000. Dr. Kozachuk will transfer all right, title and interests in the three U.S. patents at suit – in suit in this case to – MedPointe will review a pending Felamate (phonetic) application of Dr. Kozachuk's to determine whether in our view it triggers his obligations under his agreement with Carter Wallace. If it does, I will – I will speak with Mr. Posillico. And if we cannot reach agreement on a proper course of action in light of our view that it triggers his obligation, the parties will agree to arbitrate that dispute. And we will – I will work with Mr. Posillico in selecting a mutually acceptable arbitrator.

Dr. Kozachuk has presented that that application that I just referred to is his only U.S. patent application involving Felamate. This settlement is without prejudice to MedPointe's or Meda Pharmaceutical's rights with respect to any foreign patents or patent applications for foreign patents obtained by Dr. Kozachuk or pending foreign applications by Dr. Kozachuk relating to Felamate. The parties will execute releases that are consistent with the foregoing terms. And Mr. Posillico and I will – will reduce these terms, as well as any other – other terms, ancillary terms

in a written settlement agreement.

***

MR. BROWN: Ms. French wanted me to – to clarify what the – what the – what the arbitration decision would be. It would be is if there's a dispute as to whether this patent application triggers Dr. Kozachuk's obligations, the arbitrator would then decide whether the – whether the application or if it's then a pending patent would need to be transferred to – to Meda under the terms of the agreement.

THE COURT: Okay.

MS. FRENCH: Yes.

THE COURT: Ms. French?

MS. FRENCH: That – that I agree with.

THE COURT: Okay. And all of the other terms as well?

MS. FRENCH: Yes.

THE COURT: Okay. Mr. Posillico, do you have anything that you want to clarify and do you agree to the terms as outlined?

MR. POSILLICO: I – I agree. The only thing I would add, just by way of clarification – I think this is a relatively minor point – is the arbitration would be directed potentially at least to part of the patent application. In other words, it's not all or none. There may be certain claims that MedPointe believes are subject to the agreement and other claims that are not. So the arbitration may be some – some sub portion of the patent application. With that understanding, otherwise, I'm in full agreement.

MR. BROWN: Yeah. Yeah. We agree that it – you know, obviously pending review of it, it could relate to only some of the plans. We agree with that.

THE COURT: Okay. Dr. Kozachuk, do you agree as well?

DR. KOZACHUK: Yes.

THE COURT: Okay. And I just wanted to specifically note that you were also representing that this is the only U.S. patent that involves Felamate?

DR. KOZACHUK: It is.

(*Id.* at 3:24 – 6:24). While the Court did not engage in an

extensive *voir dire* of Dr. Kozachuk, such a *voir dire* is not necessary. Further, the fact that triable issues remained in this case at the time of the settlement conferences does not mean that a settlement did not occur.

Taking into account the entire May 14, 2008 settlement conference as well as the entire exchange that took place on the Record, the Court finds that Dr. Kozachuk understood the May 14, 2008 proceeding and intended and in fact agreed to settle this matter for the terms outlined above. Dr. Kozachuk now apparently regrets his decision. That regret, however, is not a reason for this Court to refuse to enforce the settlement reached in this matter. To the contrary, the Court recommends that the settlement reached in this matter be enforced despite the fact that a writing failed to materialize due to Dr. Kozachuk's attempts to renege.

Finally, the Court finds that MedPointe should be awarded its reasonable attorneys fees and costs associated with filing its Motion to enforce settlement and with preparing for and attending the January 29, 2009 hearing. The Court notes that "[t]he general rule..., known as the 'American rule', is that each party to a lawsuit bears its own attorneys' fees." *Ford v. Temple Hosp.*, 790 F.2d 342, 346 (3d Cir. 1986) (citing *Alyseka Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 246-47, 258-59 (1975)). There are, however, exceptions to this rule. For example, a Court may award attorneys' fees to a successful party, where "his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* (internal quotation marks and citations omitted). Further, the Court in discretion may award attorneys fees and costs pursuant to its inherent powers to impose sanctions on parties to a litigation. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-

45 (1991). Though, "because of their very potency," the Court must exercise its inherent powers "with restraint" (*Id.*) and "must ensure that there is an adequate factual predicate" for doing so before relying on its inherent authority to impose sanctions. *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 74 (3d Cir. 1994).

Here, the Court finds that Dr. Kozachuk's refusal to sign the revised Settlement Documents was entirely unjustified as the revised Settlement Documents accurately reflect the essential terms of the settlement reached by the parties. Further, Dr. Kozachuk's behavior unfairly increased MedPointe's costs of litigating this matter. Under these circumstances, the Court finds that that imposition of sanctions is warranted. Consequently, while the Court does not believe that MedPointe should be awarded all of its attorneys fees and costs since August 12, 2008, the Court does find that MedPointe should be awarded the reasonable attorneys fees and costs incurred in drafting and filing the Motion to enforce settlement and in preparing for an attending the January 29, 2009 hearing.

III. CONCLUSION

For the reasons set forth above, the Court recommends that MedPointe's Motion to enforce settlement be granted. The Court also recommends that MedPointe be awarded its reasonable attorneys fees and costs associated with filing its Motion to enforce settlement and preparing for and attending the January 29, 2009 hearing.

IT IS therefore on this 3rd day of March, 2009,

RECOMMENDED that MedPointe's Motion to enforce settlement be granted; and its is further

RECOMMENDED that sanctions be imposed against Dr. Kozachuk for the amount of MedPointe's reasonable attorneys fees and costs incurred in drafting and filing its Motion to enforce settlement and in preparing for an attending the January 29, 2009 hearing. If this Report and Recommendation is adopted, MedPointe is instructed to submit its fee petition to this Court within ten days of being served with a copy of the Order and/or Opinion adopting this Report and Recommendation; and it is further

ORDERED that pursuant to L. Civ. R. 72.1(c)(2) and Fed. R. Civ. P. 72(b), within ten (10) days after being served with a copy of this Report and Recommendation, and party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections with ten (10) days after being served with a copy thereof; and it is further

ORDERED that the Clerk of the Court mail a copy of this Report and Recommendation to Dr. Kozachuk at 757 Frederick Road, Suite 102, Catonsville, MD 21228.

Respectfully submitted,

__s/Tonianne J. Bongiovanni
TONIANNE J. BONGIOVANNI
UNITED STATES
MAGISTRATE JUDGE

Appendix E

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF
JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGEMENT ENTERED: 04/06/10

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

In formation is also provided about petitions for rehearing and petitions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Appellant(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made

to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonably time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued).

JAN HORBALY
Clerk

cc: Walter E. Kozachuk
Richard H. Brown, III

MEDPOINTE HEALTHCARE V. KOZACHUK, 2009-1500
DCT – NJ, 3:04-cv-02019

Appendix F

UNITED STATES MAGISTRATE COURT
TRENTION, NEW JERSEY
CIVIL PART
DOCKET NO. CV-04-2019 (MLC)

MEDPOINTE HEALTHCARE,	:	AUDIO TAPED
	:	TRANSCRIPT
Plaintiff,	:	OF
	:	SETTLEMENT
vs.	:	CONFERENCE
	:	
MD WALTER E. KOZACHUK	:	
	:	
Defendant	:	

Place: Trenton Courthouse
Trenton, New Jersey

Date: Wednesday, May 14, 2008

B E F O R E:

THE HONORABLE TONIANNE J. BONGIOVANNI, U.S.M.J.

TRANSCRIPT ORDERED BY:

STEFANIE TRUPPI

APPEARANCES:

RICHARD H. BROWN, ESQ.,
(Day Pitney, LLP)
Attorney for the Plaintiff

JOSEPH POSILLICO, ESQ.
(Synnestvedt & Lechner, LLP)
Attorney for the Defendant

AudioEdge Transcription, LLC
425 Eagle Rock Avenue – Suite 201
Roseland, New Jersey 07068
(973) 618-2310
www.audioedgetranscription.com

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[Transcript at page 2]

Colloquy

THE COURT: Okay. We're on the record in Medpointe versus Kozachuk and may I have appearances, please?

MR. BROWN: Yes, Your Honor. For the Plaintiff MedPointe Healthcare, Richard Brown, Day Pitney. With me is – is Elizabeth French from the client.

THE COURT: Okay. And for Dr. Kozachuk?

MR. POSILLICO: Joseph Posillico, Synnestvedt and Lechner. And Dr. Kozachuk is here.

THE COURT: Okay. I understand we've been participating in settlement discussions. It's nearly seven o'clock. You gentlemen and ladies have been here since 2:30 and it appears that we have terms that we'd like to place on the record.

So, Mr. Brown, as plaintiff, I would ask you to do that. And then, Ms. French, I would ask you if you concur in the terms. And then I would turn to you, Mr. Posillico, likewise ask you if – make sure we have all of our bases covered and then ask Dr. Kozachuk if he agrees as well. So you can be seated as you go through this if you'd like.

MR. BROWN: It's easier for me to stand.

THE COURT: Okay.

[Transcript at page 3]

Colloquy

MR. BROWN: All right, Your Honor, we've – we've agreed to the – the settlement and principle on the following terms: MedPointe will pay to Dr. Kozachuk $60,000.00. Dr. Kozachuk will transfer all right, title and interest in the three U.S. patents at suit – in suit in this case to – to MedPointe or its – its successor, Meda (phonetic) Pharmaceuticals. We – we – that is MedPointe will review a pending Felamate (phonetic) application of Dr. Kozachuk's to determine whether in our view it triggers his obligations under his agreement with Carter Wallace. If it does, I will – I will speak with Mr. Posillico. And if we cannot reach agreement on a proper course of action in light of our view that it triggers his obligation, the parties will agree to arbitrate that dispute. And we will – I will work with Mr. Posillico in selecting a mutually acceptable arbitrator.

Dr. Kozachuk has represented that that application that I just referred to is his only U.S. patent application involving Felamate. This settlement is without prejudice to MedPointe's or Meda Pharmaceutical's rights with respect to any foreign patents or patent application for foreign patents obtained by Dr. Kozachuk or pending foreign applications by Dr. Kozachuk relating to Felamate. The parties will execute releases that are consistent with the foregoing terms. And Mr. Posillico and I will – will reduce these terms, as well as any other – other terms, ancillary terms in a written settlement agreement.

[Transcript at pages 4-5)

Colloquy

THE COURT: Okay. And, Ms. French, I know you're here on behalf of your client. Do you agree to those terms. Anything that you want to –

(Ms. French and Mr. Brown conferring at this time)

MS. FRENCH: I'm sorry, Your Honor.

MR. BROWN: Yeah.

THE COURT: That's okay. Take your time.

MR. BROWN: Ms. French wanted me to – to clarify what the – what the – what the arbitration decision would be. It would be is if there's a dispute as to whether this patent application triggers Dr. Kozachuk's obligations, the arbitrator would then decide whether the – whether the application or if it's then a pending patent would need to be transferred to – to Meda under the terms of the agreement.

THE COURT: Okay.

MS. FRENCH: Yes.

THE COURT: Ms. French?

MS. FRENCH: That – that I agree with.

[Transcript at page 5]

Colloquy

THE COURT: Okay. And all of the other terms as well?

MS. FRENCH: Yes.

THE COURT: Okay. Mr. Posillico, do you have anything that you want to clarify and do you agree to the terms as outlined?

MR. POSILLICO: I – I agree. The only thing I would add, just by way of clarification – I think this is a relatively minor point – is the arbitration would be directed potentially at least to part of the patent application. In other words, it's not all or none. There may be certain claims that MedPointe believes are subject to the agreement and other claims that are not. So the arbitration may be some – some sub portion of the patent application. With that understanding, otherwise, I'm in full agreement.

THE COURT: Mr. Brown?

MR. BROWN: Yea. Yea. We agree that it – you know, obviously pending review of it, it could relate to only some of the plans. We agree with that.

THE COURT: Okay. Dr. Kozachuk, do you agree as well?

[Transcript at pages 5,6]

DR. KOZACHUK: Yes.

THE COURT: Okay. And I just wanted to specifically note that you were also representing that this is the only U.S. patent that involves Felamate?

DR. KOZACHUK: It is.

THE COURT: Okay.

MR. BROWN: Application I think you're --

THE COURT: Thank you.

MR. BROWN: Yeah.

THE COURT: Felamate patent. Right. An application.

Okay. Then what I will do just advise Judge Cooper that this matter has been reported as settled and placed on the terms on the record. I'll ask her to enter the standard 60-day order to give you ample time to dot your I's and cross your T's as I'd like - - like to say. If you have issues, my door is open. Although I don't want to have extensions granted freely, I don't expect that either of you will take advantage of that. But if you for some reason are having

issues with getting this document prepared and finalized within the 60 days, just let me know and I will work with you to give you some breathing room there.

But I really do appreciate the efforts here. I know it was a little heated and at times literally because they have turned off the air. We're lucky we still have lights. But it's your tax dollars being saved. So I'll send you all off. I'll keep my fingers crossed that you have no other litigation in the future. And I applaud the efforts. I'm just sorry we didn't have this team working together three years ago. I'm really sorry that we didn't because perhaps we wouldn't have arrived here, but you never know. Sometimes it just takes the eve of trial. I do really appreciate the professionalism that everyone brought today. So good luck. Thank you.

MR. BROWN: Thank you, Your Honor.

MS. FRENCH: Thank you.

MR. POSILLICO: Thank you, Your Honor.

THE COURT: Get out of here safely. We still have some daylight.

(Whereupon, the proceedings were concluded.)

[Transcript at pages 7,8]

CERTIFICATION

I, MARYANN MAHON, the assigned transcriber, do hereby certify that the foregoing transcript of the proceedings before the United States District Court, District of New Jersey, Trenton, New Jersey, Civil Part, on May 14, 2008, is prepared in full compliance with the current Transcription Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings to the best of my knowledge and ability.

[Original signature in
Transcript at page 9]

_____ September 16, 2008

Maryann Mahon A.O.C. 507 Date
Audio Edge Transcription, L.L.C.

[Transcript at page 9]